

TAB D

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**CYCLE-CRAFT CO., INC. d/b/a
BOSTON HARLEY-DAVIDSON/BUELL
Plaintiff,**

v.

**HARLEY-DAVIDSON MOTOR CO., INC.
and BUELL DISTRIBUTION CO., LLC
Defendants.**

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* **Civil Action No. 04-11402-NMG**
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DECLARATION OF JOHN F. ATWOOD

I, JOHN F. ATWOOD, being duly sworn, do hereby depose and state:

1. I am over the age of 18 years and have personal knowledge of all of the facts stated in this Declaration.
2. I am the President of plaintiff Cycle-Craft Co., Inc. d/b/a Boston Harley-Davidson/Buell ("Cycle-Craft"). I own 83% of the stock of Cycle-Craft. My sister Karen Atwood owns the other 17%.

About the Cycle-Craft Dealership

3. Cycle-Craft is a motorcycle dealer located in Everett, Massachusetts. Cycle-Craft has been run by my family, as a Harley-Davidson dealership, for over 45 years. In 1959, my father, William Atwood, signed the dealership's first Dealer Contract with Harley-Davidson. In approximately 1994, we took on a franchise with Harley-Davidson's sister company, Buell Distribution Corp., now known as Buell Distribution Co., LLC ("Buell"). Harley-Davidson and Buell are interrelated companies (and both are referred to collectively as "Harley-Davidson")

throughout this document); loss of one dealership automatically results in loss of the other.

Copies of Cycle-Craft's current dealer contracts are attached to this Declaration as Exhibit 1.

4. We sell and service both Harley-Davidson and Buell motorcycles. We also sell a comprehensive line of Harley Davidson and Buell parts and accessories, as well as a huge range of Harley-Davidson and Buell consumer products (clothing, accessories, novelties). Cycle-Craft does not carry any other line of motorcycle, nor does it carry any line of automobiles. Absent Harley-Davidson and Buell products, Cycle-Craft would literally have no business.

5. I began working at Cycle-Craft fixing motorcycles when I was ten years old. Over time, my responsibilities increased. My sister Karen and I began running the dealership together in 1991, after our parents passed away. In 2000, Karen retired from active management of the dealership, and I am now primarily responsible for its operations.

6. In 1993, my sister and I realized that Cycle-Craft had more than outgrown its then-current 16,000 square-foot facility on the Revere Beach Parkway in Everett. We therefore began looking for a new location for the dealership. We eventually undertook a massive relocation and renovation project to move Cycle-Craft across the street into a former paint factory. The project cost \$2.7 million, and was completed in January, 1998. Although people told us that it couldn't be done, we were determined to make it work. We loved the building because it reminded us of Harley Davidson's headquarters in Milwaukee. See Kathy McCabe, *A Bumpy Ride to the Top – Small Business Award Winners Take a Risk and Turn Contaminated Paint Factory Into a Roaring 'Hog' Dealership*, BOSTON GLOBE, July 14, 1999, at E4, a true and accurate copy of which was obtained from the Infoweb Newsbank online news archive,¹ and attached hereto as Exhibit 2.

¹ Unless otherwise noted, all historical newspaper articles appearing as exhibits in computer print-out form were obtained using this online news service.

7. The remodeled building consists of 86,000 square feet and made Cycle-Craft one of the largest Harley-Davidson dealerships in the world. At the same time, we were able to preserve the charm and heritage of the 100-year-old industrial building.

8. At the time of the opening of the new facility, David Ragucci, Mayor of Everett, predicted that it would help revitalize that portion of the Revere Beach Parkway, commenting, "It is a worthwhile investment that can only serve to attract new businesses to our community." Kathy McCabe, *Bank In Everett Is Branching Out*, BOSTON GLOBE, April 19, 1998, at 11, attached hereto as Exhibit 3. Indeed, today the formerly dilapidated portion of the Parkway on which Cycle-Craft sits is a thriving commercial area.

9. The expansion of Cycle-Craft's business, concurrent with our renovation of a formerly abandoned and polluted factory, prompted the Massachusetts chapter of the U.S. Small Business Association ("SBA") in 1998 to name Karen and me Small Business Persons of the Year for Massachusetts. At the time, Elaine Guiney, Massachusetts SBA director, said, "Their action catapulted them into a leadership role in the Harley-Davidson [company]. They took over a building and a business that was faltering, and rescued it." Exhibit 2 at page 2.

10. Commenting on the \$1 million, SBA-backed loan we obtained from the MassCertified Development Corp. to help finance the renovation, the president of MassCertified commented, "We liked what we saw in [Cycle-Craft]... It was a well-known product – and a family-owned business – with a long history. They were going to renovate an ugly building and create jobs. We felt it was a winner." *Id.*

11. Jeff Bleustein, chairman of Harley-Davidson's Board of Directors, visited our building in early 1998 when the remodeling was complete. He told us that the building looked more like Harley-Davidson's original headquarters than its current headquarters look now.

12. The newly-situated dealership was in fact featured prominently in the 1997 Harley-Davidson Annual Report. The report held up our investment as an example to other Harley-Davidson dealers, commenting, "The skills acquired by dealers each year at Harley-Davidson University, as well as the capital improvements exemplified by the Atwood's investments, make our dealers the best in the business. The Atwoods' three-story, 86,000 square-foot facility is an example of that excellence." An excerpt of the 1997 Annual Report, obtained from Harley-Davidson's web site, is attached as Exhibit 4.

13. The 1997 Annual Report also highlighted Cycle-Craft's state-of-the-art facilities, noting, "In addition to a 5,000 square-foot showroom, 15,000 square-feet are dedicated to MotorClothes apparel and collectibles, and parts and accessories. The service department has 15,000 square feet, featuring 16 lifts and a fully outfitted dynamometer area." Id. Our facilities have only improved since those words were published by Harley-Davidson. See Exhibit 5, a true and accurate video recording of the Cycle-Craft facility, recorded on Saturday June 12, 2004.

14. The dealership facility is owned by an entity known as Wood Realty, which is also owned by me and my sister Karen, and leased to Cycle-Craft pursuant to a thirty-year lease. The dealership pays rent of \$36,000 per month to Wood Realty. The rent represents only a pass-through of debt service and taxes.

15. Cycle-Craft employs over 60 men and women to handle sales, service, finance, parts, accessories and motor clothes. The majority of these employees come live in the Everett area, and are motorcycle riders and enthusiasts.

16. Cycle-Craft provides many of these employees with health coverage under Blue Cross/Blue Shield, dental coverage, short and long-term disability insurance, and a savings plan through American Express Financial Advisors.

17. According to recent estimates, Cycle-Craft currently has a net worth of over \$10 million, and last year (2003) the dealership realized net sales of almost \$6 million.

Dealership Performance

18. Cycle-Craft is a very successful dealership for Harley-Davidson. Over the past three or four years, we have sold approximately 700-800 new, and 400-500 pre-owned, motorcycles per year, mostly between April and October. Cycle-Craft has for several years been among the top ten percent of Harley-Davidson dealers nationwide in the purchase of motorcycles, motor clothes, parts and accessories.

19. Over the decades, Cycle-Craft has been the recipient of the "Bronze Shield" award, conferred by Harley-Davidson to recognize the dealership's superlative performance.

20. More recently, Cycle-Craft has received several "Pegasus" awards, conferred by Buell to recognize the dealership's superlative performance.

21. In 2001, Cycle-Craft was awarded the United States Police Sales and Service Dealership of the Year award for the eastern region of the country.

22. Most recently, Cycle-Craft was invited to participate in a dealer incentive trip to Alaska, an honor bestowed only on the top 30 (of over 650) dealerships in the country. This invitation was subsequently revoked, purportedly due to the present controversy. See letter dated May 27, 2004 to John Atwood, from Jon Flickinger, attached as Exhibit 6.

23. Cycle-Craft routinely performs as one of the top 10% purchasing volume dealers for Harley-Davidson nationwide in every category: motorcycles, parts, accessories and general merchandise. Over the past three years, Harley-Davidson's market share in the Boston area (where Cycle-Craft is the exclusive dealer) has routinely met or exceeded its market share throughout New England. Boston also exceeds Harley-Davidson's market share nationwide. A

true and accurate accounting of market share figures provided verbally to Cycle-Craft by Harley-Davidson is attached as Exhibit 7.

24. Due to its commitment to superior service, Cycle-Craft has an extraordinarily loyal customer base. Many customers are second generation customers, and hundreds of them participate actively in the Harley Owners' Group ("HOG") chapter sponsored by the dealership.

Community Involvement

25. In addition to the positive impact on the Everett/Revere Beach Parkway Community that resulted from Cycle-Craft's transformation of an abandoned, polluted paint factory into a state-of-the-art Harley-Davidson dealership and retail outlet, Cycle-Craft is in many additional ways an extremely active corporate citizen.

26. Cycle-Craft sells and leases motorcycles to literally dozens of area police departments, and several of these departments rely on Cycle-Craft to service their motorcycles as well. See list of customer police departments, attached as Exhibit 8. In fact, Cycle-Craft employs a Police Fleet Sales Manager specifically to handle this significant aspect of its business.

27. Over the years, Cycle-Craft has raised and donated literally hundreds of thousands of dollars to local charitable and civic organizations, both independently and through its sponsorship of the local HOG chapter. The dealership sponsors, raises money for and/or holds benefit rides and other events to raise money for multiple local charities, including the Muscular Dystrophy Association, the Comen Breast Cancer Foundation, the Ronald McDonald House, My Brother's Table, the Massachusetts Firefighters' Association, the Everett Cal Ripken Buddy Ball League for Mentally Challenged Children, the American Cancer Society and the local Kiwanis chapter. See, e.g.: Steve Rauchscher, *Biker Benefit Ride Raises Cash For Kids With Cancer*, BOSTON HERALD, July 31, 2000 (9th annual ride raised \$45,000 for Ronald McDonald House),

attached as Exhibit 9; Anne Martinez, *Motorcyclists Take to the Road to Help - Charity Fund-Raiser Benefits House For Children With Cancer*, BOSTON GLOBE, July 31, 1995, at 16, attached as Exhibit 10; Paul Restuccia, *High On Hog At Everett Harley Dealership*, BOSTON HERALD, May 9, 1998, at c14 ("Every year the [Cycle-Craft HOG] chapter sponsors a ride for the Ronald McDonald House, an AIDS children's camp run and the Witch Hunt Ride for Muscular Dystrophy"), attached as Exhibit 11; *Harley-Davidson "pitches-in" to Cal Ripken Buddy Ball*, EVERETT ADVOCATE, May 28, 2004, at 11, attached as Exhibit 12; true and accurate copy of a press release prepared in connection with Cycle-Craft's HOG group's donation of a check for \$5,000 to the Denise Merrill Advocacy Fellowship of the American Cancer Society, attached as Exhibit 13; true and accurate copies of fliers and photographs reflecting a wide variety of other charitable and community events held at or sponsored by Cycle-Craft, attached as Exhibit 14.

28. In addition to the significant contributions Cycle-Craft makes to area charities, the dealership is also very active within the community, frequently holding parties, barbeques and other events that are open to the public and geared to all ages. See, e.g., Restuccia, *High on Hog*, at Exhibit 12; Chris Reidy, *Wheels Are In Motion For Area Harley Dealer*, BOSTON GLOBE, April 24, 1998, at C4 ("A family atmosphere is important to Atwood, so there will also be dunking tanks and carnival-style booths where kids can get their faces painted"), attached as Exhibit 15; true and accurate copies of fliers and photographs reflecting a wide variety of other community events held at Cycle-Craft, attached as Exhibit 16.

Cycle Craft and Harley Davidson – the Contract

29. On or about September 19, 2000, Cycle-Craft entered into its most recent Dealer Contract with Harley-Davidson and with Buell. Exhibit 1. Cycle-Craft was assigned a Dealer Territory encompassing approximately 160 zip codes in Eastern Massachusetts.

30. Cycle-Craft's Dealer Contracts with Harley-Davidson and Buell refer to certain General Conditions. A copy of the General Conditions is attached as Exhibit 17.² Paragraph B-6 of the General Conditions provides that "Dealer shall not sell Harley-Davidson Products for resale to non-retail customers," and reserves the right to establish policies necessary to carry out the purpose of the provision.

31. Effective with the 2003 model year, which began on August 1, 2002, Harley-Davidson published a policy called "Motorcycle Non-Retail Policy -- Pleasure Units." Exhibit 18. Harley made no attempt to bring this new written policy specifically to the attention of our dealership, and at most simply mailed a copy.

32. The Non-Retail Policy prohibits dealers from engaging in non-retail sales of motorcycles without Harley-Davidson's prior approval. The policy defines a "non-retail sale" as a sale where:

the motorcycle is not properly set up, inspected, tested, sold and delivered at the dealership facility, directly to the ultimate consumer. An "ultimate consumer" is the retail end user who purchases, as indicated on the Certificate of Origin, a new or previously unregistered motorcycle for his or her own use, without the intent to resell, pays all applicable taxes and registration fees, and titles the vehicle in his or her name.

Id. at ¶1. Harley-Davidson also claims to be able to call "non-retail" any sale where the dealer knew or should have known that the customer intended to resell the motorcycle. Id.

33. Starting with the beginning of the 2004 model year on August 1, 2003, Harley-Davidson changed its new Non-Retail Policy. Exhibit 19.

² Although the document attached as Exhibit 17 is dated April 9, 2002, my field representative from Harley-Davidson has represented that it is identical to the version that was in force when CycleCraft executed the most recent Dealer Contract in September, 2000.

Harley-Davidson's Announcement of a Potential New Dealer

34. In approximately December 2002, Harley-Davidson informed Cycle-Craft that it had decided to "monitor" the Danvers, Massachusetts area as a possible market for a new Harley-Davidson dealership. See email from Al Contois, Harley-Davidson Field Representative, dated May 3, 2004 (stating, "As you know in December 2002, the Danvers area had been identified by Harley-Davidson as a possible site for a target dealership"), at Exhibit 20.

35. Danvers is within a 20-mile radius of Cycle-Craft, meaning that any new dealership located there would cut into Cycle-Craft's market area, as established by Massachusetts General Law Chapter 93B section (1), which sets a 20-mile radius at the protected market area for dealerships selling "power-sport vehicles," including motorcycles.

36. On February 4, 2003, Harley-Davidson sent Cycle-Craft a letter advising us that Harley-Davidson would be removing 25 zip codes from our Dealer Territory. Harley-Davidson stated in that notice that it intended to monitor these 25 zip codes for the purpose of possibly installing a new Harley-Davidson/Buell dealer in the vicinity of Danvers. Exhibit 21.

37. On March 7, 2003, my lawyer notified Harley-Davidson that I intended to protest the appointment of any new Harley-Davidson or Buell dealer in the vicinity of Danvers, Massachusetts. Exhibit 22. Harley-Davidson never responded to my lawyer's letter.

38. I am acquainted with a Harley-Davidson dealer in New Hampshire who received a similar letter from Harley-Davidson taking nine Massachusetts zip codes out of his territory. That dealer protested that decision in New Hampshire more than a year ago, and the case is still going on. A copy of one of Harley-Davidson's filings from that protest is attached as Exhibit 23.

Harley-Davidson's Inspection of Cycle-Craft's Sales Records

39. On February 17 and 18, 2004, Harley-Davidson conducted an inspection of Cycle-Craft's sales records. This is the first such inspection I ever remember by Harley-Davidson. We gave Harley-Davidson's personnel free access to the dealership, and to approximately 2800 records of motorcycle sales that occurred in the years 2001 through 2003. Harley-Davidson's personnel asked Cycle-Craft's employees to leave the room while they were conducting the inspection, and we did so.

40. On April 20, 2004, Harley-Davidson's Vice President Jon Flickinger sent us a letter entitled "Inspection of Records." Exhibit 24. In that letter, Mr. Flickinger identified 45 motorcycles out of the 2800 available to be inspected, which it claimed were sold in violation of the Non-Retail Policy.

41. In fact, there are perfectly justifiable explanations for each of the sales wrongly identified by Harley-Davidson as non-retail sales. To cite the example for which I have the best personal knowledge, the "Inspection of Records" letter claims that three motorcycles "were falsely reported as having been sold at retail, when in fact they had not been sold at all, but remained in dealer inventory as of the date of inspection." *Id.*, at p. 3. In fact, these units were accurately reported as sold to Cycle-Craft. Each year I buy two or three units from the model year, and keep them in a collection – this is a kind of informal Harley-Davidson museum. An accurate list of all of the motorcycles currently in that collection is attached as Exhibit 25. The three units in question, from Harley-Davidson's 100th anniversary model year, were added to that collection. Cycle-Craft still is in possession of these units, and does not intend to broker or resell these units. They are legitimate, retail sales to Cycle-Craft, executed in full compliance with the non-retail sales policy.

The Termination Notice

42. Mr. Flickinger of Harley-Davidson sent another letter to Cycle-Craft on April 20, 2004, which was received on April 23, 2004. That letter is entitled "Notice of Dealer Contract Termination." Exhibit 26. It accuses Cycle-Craft of submitting false information to Harley-Davidson, selling Harley-Davidson products to non-retail purchasers, and failing to complete and maintain completed SWR forms and other paperwork. *Id.*, at 1. Mr. Flickinger states in this letter that these acts "constitute[] a direct and material violation of Cycle-Craft's contractual obligations to Harley-Davidson." *Id.* Mr. Flickinger advised Cycle-Craft that its Dealer Contracts for the Harley-Davidson and Buell franchises would be terminated sixty days from Cycle-Craft's receipt of the letter, or June 22, 2004. *Id.*

43. At no time prior to Cycle-Craft's receipt of the April 20, 2004 termination letter did Harley-Davidson give the dealership the opportunity to explain or justify the challenged sales, or to cure any actual violations that might have taken place.

44. At no time prior to Cycle-Craft's receipt of the April 20, 2004 termination letter did Harley-Davidson impose any less severe penalty on Cycle-Craft, as was its option under the terms of its non-retail policy.

45. In other words, on the very day that Harley-Davidson sent Cycle-Craft a letter calling its attention to supposed violations of its non-retail policy in connection with the sale of 45 motorcycles (out of approximately 2800 sales records reviewed), it also sent us a letter announcing its intention to terminate our 45-year-old dealership.

46. It is my personal belief that Harley-Davidson did not afford Cycle-Craft the opportunity to explain or cure the claimed violations because Harley-Davidson intends to use this controversy as leverage to push Cycle-Craft out of the Boston market, thereby clearing the way

for Harley-Davidson to open a dealership in Danvers – a very attractive market for motorcycles – an action that would otherwise encroach upon Cycle-Craft’s statutorily-protected market area.

47. My family and I have always intended to be truthful and professional in our dealings with Harley-Davidson, and I believe that we have dealt in good faith with Harley-Davidson for the 45 years that we have been a Harley-Davidson dealer. I did not intend to submit false sales information to Harley-Davidson, and do not believe that Cycle-Craft in fact did so.

48. Cycle-Craft has no other business besides our Harley-Davidson and Buell franchises. If we lose those franchises, it will be very difficult, if not impossible, to replace them with another line of motorcycles. The application process itself would take several months, during which the business would have no income.

49. In addition, if Cycle-Craft is forced to seek another brand of motorcycles to utilize our facility, we are likely to run up against exactly the statutory market-share protections that Harley-Davidson is currently encountering in its efforts to open another dealership in Danvers.

50. Simply put, closing Cycle-Craft – even temporarily – will put an end to a nearly five-decades-old, family-run, highly successful local institution. It will put over sixty employees out of work. It will deprive hundreds of customers of a local and convenient facility for their motorcycle purchasing, service and accessory needs. Harley-Davidson will completely lose representation in the Boston metropolitan area. The next closest Harley-Davidson dealership is Billerica, Massachusetts.

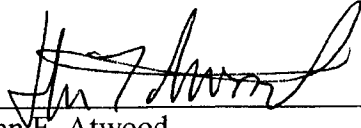
51. The City of Everett will lose the showplace that sits at the center of a bona-fide story of urban renewal.

52. There will be no tenant in the facility, leaving my family responsible for \$36,000 per month in debt service and taxes on the building unless and until a new tenant is found.

53. My family will lose the benefit of two generations of hard work and calculated risk-taking, and of the millions of dollars in personal family funds invested in the enormous degree of success the business currently enjoys.

54. Personally, I will lose the possibility of some day seeing my children take over the business from me, as my sister and I did from our parents. That hope is at the very center of why my family has run Cycle-Craft with the integrity, drive and commitment that have been the touchstones of our success for nearly half a century.

I declare under penalty of perjury under the laws of the Commonwealth of Massachusetts that the foregoing is true and correct and that this declaration was executed in Everett, Massachusetts on 6/21/04, 2004.



John F. Atwood